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8
9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO

11 In re

12 PLAN COMPLIANCE GROUP, LTD.,

13 Debtor.

Case No. 3:07-cv-03713-MJJ

Assigned to: Hon. Martin J. Jenkins

14 **DEFENDANT'S REPLY IN SUPPORT OF**
15 **MOTION FOR WITHDRAWAL OF**
16 **REFERENCE**

17 [Federal Rules of Bankruptcy Procedure
Rules 5011 and 28 U.S.C. § 157(d)]

[Filed concurrently with Notice and Motion;
and Request For Judicial Notice.]

18 JOHN T. KENDALL, Chapter 7 Trustee,

19 Plaintiff,

20 vs.

21 HARTFORD FIRE INSURANCE
22 COMPANY, a Connecticut Corporation,

23 Defendant.

Date: 12/4/07
Time: 9:30 a.m.
Ctrm: 11

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1 I. INTRODUCTION

2 28 U.S.C. § 157(d) provides that “[t]he district court may withdraw, in whole or in part,
3 any case or proceeding referred under this section, on its own motion or on timely motion of any
4 party, for cause shown.” In determining whether to withdraw reference under 28 U.S.C. § 157(d),
5 the court should consider whether the matter is core or non-core, as well as “the efficient use of
6 judicial resources, delay and costs to the parties, uniformity of bankruptcy administration, the
7 prevention of forum shopping, and other related factors.” *In re Daewoo Motor America, Inc.*, 302
8 B.R. 308, 310 (C.D. Cal. 2003) (citing *Security Farms v. Int’l Bhd. of Teamsters*, 124 F.3d 999,
9 1008 (9th Cir. 1997)). Here, all pertinent factors favor of withdrawal of reference of the adversary
10 proceeding by plaintiff JOHN T. KENDALL (“Plaintiff”), the Chapter 7 Trustee in the matter
11 captioned “In re Plan Compliance Group, Ltd.,” Case No. 05-49454 RN7 of the United States
12 Bankruptcy Court, Northern District of California, Oakland (the “PCG Bankruptcy”) against
13 defendant and movant HARTFORD FIRE INSURANCE COMPANY (“HARTFORD”).

14 II. ARGUMENT

15 A. **The Matter Before this Court is a Non-Core Proceeding that Does Not Depend 16 on Bankruptcy Laws for its Existence.**

17 Though the core / non-core distinction is not dispositive, “it is helpful to make the
18 core/non-core determination before considering the other factors because this determination
19 implicates the efficiency and uniformity factors.” *In re Daewoo Motor America, Inc.* 302 B.R.. at
20 311-12.

21 Notwithstanding Plaintiff’s reliance upon *In re U.S. Lines, Inc.*, 197 F.3d 631 (2d Cir.
22 1999) to argue that the instant matter is a core proceeding, the Ninth Circuit employs a *more*
23 *stringent* standard to determine whether a matter is a core or non-core proceeding:

24 The Ninth Circuit has stated its general test for making the core/non-
25 core determination as follows: “Actions that do not depend on
26 bankruptcy laws for their existence and that could proceed in
27 another court are considered ‘non-core.’ ” *Security Farms v. Int’l*
Bhd. of Teamsters, 124 F.3d 999, 1008 (9th Cir.1997). Other
28 circuits, including the Third, Sixth, Seventh, Eighth, and Tenth have
stated the same test. *See Halper v. Halper*, 164 F.3d 830, 836 & n.
7 (3d Cir.1999) (listing cases).

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1 The Second Circuit is less stringent concerning the interpretation of
 2 the catch-all provisions. In *In re Best Products Co., Inc.*, the
 3 Second Circuit reiterated its conclusion that this jurisdictional grant
 4 ought to be broadly construed. 68 F.3d 26, 31 (2d Cir.1995). ...

5 * * *

6 Although there is something of a circuit split regarding how broadly
 7 the catch-all provisions ought to be construed, the Ninth Circuit
 8 clearly comes down on the side of narrow construction.

9 *In re Daewoo Motor America, Inc.*, 302 B.R. 308, 311-12 (C.D. Cal. 2003).

10 Though Plaintiff argues that the "largest potentially available asset from which to pay
 11 PCG's creditor claims are the insurance proceeds under the Policy for coverage of Reimers' theft,"¹
 12 his argument misses the point: Mere augmentation of the estate's assets, without direct impact on
 13 the bankruptcy court's core administrative functions, does not mean an adversary proceeding is, *a*
 14 *fortiori*, a core proceeding. See, e.g., *In re Daewoo Motor America, Inc.*, 302 B.R. at 313 (citing
 15 *In re U.S. Lines, Inc.*)

16 The unrebutted fact is that Plaintiff's action to enforce the terms of an insurance contract
 17 does not depend upon bankruptcy laws for its existence.

18 **B. Reference of this non-core proceeding must be withdrawn because Hartford is**
 19 **entitled to jury trial.**

20 Plaintiff does not dispute that where "there is a right to jury trial in a non-core matter, that
 21 factor may weigh heavily in favor of withdrawing the reference so as to give the parties an
 22 opportunity for a jury trial in the district court." *Daewoo Motor*, above, 302 B.R. at 314 (citing
 23 *Orion Pictures Corp. v. Showtime Networks*, 4 F.3d 1095, 1101 (2d Cir. 1993)). Plaintiff also
 24 does not dispute that HARTFORD will not consent to a trial by jury by the bankruptcy court.
 25 Rather, Plaintiff's opposition is premised upon arguments. First, that this matter is a core
 26 proceeding, which is refuted above and in HARTFORD's moving papers. Second, that Plaintiff's
 27 action to enforce an insurance contract is equitable in nature because he styled it as a declaratory
 28 relief action. As Plaintiff puts it, "What Plaintiff seeks through his declaratory relief action is a

¹ Plaintiff's Opposition to Defendants Motion for Withdrawal of Reference ("Opp.") at p. 5, ll. 18-20.

1 court's interpretation of [HARTFORD's] obligations under the Policy vis-à-vis the losses sustained
 2 by PCG due to Reimers' defalcations."

3 Plaintiff's attempt to exalt form over substance is not supported by law.

4 Insofar as the right to a jury trial is concerned, it is erroneous to say
 5 that all declaratory relief actions are equitable; an action for
 6 declaratory relief has been characterized as 'sui generis.' (*Veale v.*
 7 *Piercy*, 206 Cal.App.2d 557, 560-561, 24 Cal.Rptr. 91.) Where an
 8 action for declaratory relief is in effect used as a substitute for an
 9 action at law for breach of contract, a party is entitled to a jury trial
 10 as a matter of right. (*State Farm Etc. Ins. Co. v. Superior Court*, 47
 11 Cal.2d 428, 431-432, 304 P.2d 13; *Allstate Ins. Co. v. Normandie*
 12 *Club*, 221 Cal.App.2d 103, 105-106, 34 Cal.Rptr. 280.) "...
 13 (C)ourts will not permit the declaratory action to be used as a device
 14 to circumvent the right to a jury trial in cases where such right
 15 would be guaranteed if the proceeding were coercive rather than
 16 declaratory in nature." (*State Farm Etc. Ins. Co. v. Superior Court*,
 17 *Supra*, 47 Cal.2d p. 432, 304 P.2d p. 15; Witkin, California
 18 Procedure (1967 Supp.) p. 678; Comment (1959) 6 U.C.L.A.L.Rev.
 19 678, 688.)

20 *Patterson v. Ins. Co. of No. America*, 6 Cal.App.3d 310, 315, (1970)

21 Whether and to what extent Plaintiff may enforce the terms of HARTFORD's insurance
 22 contract will depend upon principles of contract law, not equity. Accordingly, HARTFORD has a
 23 right to trial by jury, regardless of Plaintiff's chosen nomenclature. As such, this Court should
 24 withdraw reference of this matter from the bankruptcy court.

25 **C. Other factors militate in favor of withdrawal of reference.**

26 Per Plaintiff's opposition, there are no other similar adversary proceedings:

27 The debtor, PCG, exists in name only, having no assets of substance
 28 to repay the millions of dollars in creditor claims. But for Reimers'
 defalcations, PCG would be solvent, and its former clients would
 not be forced to pursue recovery as creditors in bankruptcy. The
 largest potentially available asset from which to pay PCG's creditor
 claims are insurance proceeds under the Policy for coverage of
 Reimer's theft.

Opp., p. 5, ll 16-21.

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1 Further, there have been no related proceedings in bankruptcy court.

2 Here, the dispute is at the initial pleading stage and no discovery has
3 been undertaken by the parties; that the dispute is at this earliest of
4 stages in the proceedings renders the likelihood of proceeding to
trial and the complexity of discovery unknown.

5 Opp. p.8, ll. 13-16.

6 Plaintiff's Opposition demonstrates that efficient use of judicial resources is not furthered
7 by maintaining this proceeding in bankruptcy court. Being in the most preliminary stages, the
8 bankruptcy court has no better familiarity with insurance contract at issue. There being no similar
9 proceedings, there is no likelihood that withdrawal of reference of this matter will adversely
10 impact the uniformity of the bankruptcy administration. Further Plaintiff has identified no
11 additional delay and costs resulting from withdrawal of reference.

12 In short, Plaintiff has identified no factors that favor denial of HARTFORD's Motion for
13 Withdrawal of Reference.

14 **III. CONCLUSION**

15 For the foregoing reasons, HARTFORD respectfully requests that this Court grant its
16 Motion for Withdrawal of Reference.

17
18 DATED: November 28, 2007

ANDERSON, McPHARLIN & CONNERS LLP

19
20 By: /s/ Mark J. Krone

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